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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

FILE NO. CRI 09-3953

THE STATE OF SOUTH DAKOTA))
))
Plaintiff,))
))
VS.))
))
JOHN GRAHAM,))
))
))
Defendant.))

TRANSCRIPT OF
VERDICT

VOLUME 10 OF 10

* * * * *

BEFORE: THE HONORABLE JOHN J. DELANEY,
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
DECEMBER 10, 2010

COPY

1 * * P R O C E E D I N G S * *

2 (Whereupon, the following proceedings were
3 had in open court outside the presence of the jury.)

4 **THE COURT:** Okay.

5 I've been advised by the bailiff that the
6 foreman has contacted him and indicated to him that
7 the jury is hung and that he would like to speak with
8 me.

9 At this stage of the game, I am certainly not
10 permitted to do that in the absence of consent of
11 counsel. I certainly, under any circumstances, could
12 not ask him how the jury stands.

13 Allen charges are not approved of in state
14 court as I recall.

15 Is that the current law, Mr. Murphy?

16 **MR. MURPHY:** I don't know what the state of
17 the law is, but certainly we would be opposing an
18 Allen charge.

19 **THE COURT:** Mr. Jackley?

20 **MR. JACKLEY:** Are you asking the state's
21 position on whether you should go talk to the juror or
22 are you asking our position on the Allen charge?

23 **THE COURT:** The Allen charge first.

24 **MR. JACKLEY:** Can I consult with Mr. Oswald
25 for just a moment?

1 **THE COURT:** Yeah.

2 I have a 93 case in *State vs. Kaiser* that
3 held it reversible error in supplemental instructions.
4 Response to an inquiry by jury to instruct the jurors
5 that they must reach a unanimous verdict.

6 We have earlier decisions, 78 and 82 that
7 said the charge could be read. We have the federal
8 charge -- we have our own *Boykin*. State of South
9 Dakota.

10 Is that the big one?

11 **MR. MURPHY:** No. That was *Boykin v. Alabama*.

12 **THE COURT:** *State vs. Kaiser* held it was
13 reversible error. I haven't read it. I don't think
14 it's as solid as that. Based upon the facts in *Kaiser*
15 and a quick read, leaves about that much discretion, I
16 read, in the Court, which ain't a lot.

17 **MR. JACKLEY:** Can I call the AG's office --

18 **THE COURT:** I am sorry?

19 **MR. JACKLEY:** Can I have two minutes to call
20 the AG's office to find out if an appellate lawyer
21 can --

22 **THE COURT:** Yeah.

23 **MR. MURPHY:** Can I ask, is there some
24 security issue that we have a show of force at the
25 door?

1 **THE COURT:** Say again.

2 **MR. MURPHY:** What's the issue with the show
3 of force?

4 **SHERIFF'S DEPUTY:** There is always two
5 deputies with him. I was not told whether this was a
6 verdict or not. I wasn't --

7 **THE COURT:** I can't understand. I don't have
8 my realtime up.

9 **MR. MURPHY:** Okay.

10 (Off the record.)

11 **MR. JACKLEY:** Judge, I have a case and I
12 don't have it on me. The case is *State v. Fool Bull*.
13 It's 766 N.W.2d 159, South Dakota 2009. My
14 understanding of its proposition is the Court cannot
15 give an Allen charge. The Court cannot take steps
16 that would be deemed coercive. And the case gives
17 some general facts giving guidance to a trial court
18 judge on what the judge can do.

19 **THE COURT:** I am assuming -- and I will pull
20 that case and will read it.

21 Allison, did you get the cite?

22 **THE LAW CLERK:** Uh-huh.

23 **THE COURT:** Pull it up and have copies
24 printed for us.

25 I am assuming that something along the lines

1 are, continue to deliberate until you are convinced
2 that it is virtually impossible to reach a unanimous
3 verdict.

4 **MR. MURPHY:** But that's what an Allen charge
5 is.

6 **THE COURT:** Well, no.

7 **MR. MURPHY:** Essentially, that's what it is.

8 **THE COURT:** Somebody has to tell me that they
9 can't reach a verdict. And I can talk -- I can talk
10 to the foreman without finding out how they stand and
11 see what he says. But I am not going to do that
12 without the consent of you folks.

13 **MR. MURPHY:** And we wouldn't be consenting.

14 I mean, towards what end? If they -- I mean,
15 it appears they have sent a note to the bailiff or is
16 there a note that they have sent out saying they are
17 hung?

18 **THE BAILIFF:** No, sir. He asked if I wanted
19 it in writing and I said I would go talk to the judge
20 and then go from there.

21 **THE COURT:** Let's get it in writing.

22 **MR. JACKLEY:** I think we need to look at this
23 case just so --

24 **THE COURT:** Say again.

25 **MR. JACKLEY:** I think it would help for at

1 least the state to look at this case.

2 **THE COURT:** Well, we're going to get it.

3 Yeah. It's coming.

4 (Off the record.)

5 **THE COURT:** My point, Mr. Murphy, was if you
6 can't -- if you believe you truly can't get a verdict,
7 I want to know that.

8 **MR. MURPHY:** Right.

9 **THE COURT:** I mean, I consider that's a hung
10 jury. That's what they are telling me, they are hung.

11 But, you know, I am not sure how really solid
12 it is. Rollie indicated that the foreman said that we
13 simply will not be able to reach a verdict.

14 **MR. MURPHY:** Do you typically require that
15 note to be signed by all jurors or just the foreman?

16 **THE COURT:** Typically, I haven't had it.
17 This is new to me. So I don't know what typical is.

18 I would suspect that that's a good idea. I
19 mean, I think that would be a good idea for the record
20 if we're going to have a hung jury. And then we get
21 to go back and try it again.

22 Okay.

23 (Off the record.)

24 **MR. MURPHY:** Did you get the note?

25 **THE COURT:** Yes.

1 I have a note from the jury. It says, we the
2 jury are decided on Count One. We are undecided on
3 Count Two. Unable to resolve either within or with no
4 time frame. It's two words. It's written so it could
5 be within. But I think it's with no time frame.

6 **MR. MURPHY:** Could you say that last part
7 again?

8 **THE COURT:** It says we are undecided Count
9 Two. Unable to resolve with -- and then a space and
10 then the word I perceive to be no time frame.

11 **MR. JACKLEY:** Would you let the defendant --
12 can we see the note?

13 **THE COURT:** Yeah. Take a look.

14 **MR. JACKLEY:** Can we have just two minutes?

15 **THE COURT:** Yeah.

16 I am going to go get some water while you are
17 doing that.

18 (Off the record.)

19 **MR. MURPHY:** Do you have the verdict form?

20 **THE COURT:** With my computer out of
21 business -- it's got a number on the bottom because it
22 came from the set of instructions and then I just
23 modified it.

24 Sit down, folks.

25 Wisdom of counsel?

1 **MR. MURPHY:** We move for a mistrial.

2 **MR. JACKLEY:** Your Honor, the state's request
3 is that we receive the verdict on Count One; and that
4 you hang it on Count Two.

5 **THE COURT:** And what?

6 **MR. JACKLEY:** And that it be a hung jury on
7 Count Two.

8 **THE COURT:** Anybody have any authority --

9 **MR. JACKLEY:** It's coming.

10 **THE COURT:** -- for either the mistrial or the
11 other?

12 **MR. MURPHY:** I think the authority for the
13 mistrial is probably well established that if the jury
14 says they are unable to reach a verdict, the Court has
15 the authority to --

16 **THE COURT:** Yeah, but how about if they have
17 reached a verdict on Count One; do we have a mistrial
18 as to Count Two?

19 **MR. MURPHY:** We would be opposing any partial
20 verdict.

21 **MR. JACKLEY:** We're pretty comfortable in
22 your position, but I asked my office to email me the
23 case. I am waiting for that.

24 **THE COURT:** Kersten, you and Allison see what
25 you can find about guilty on one and hung on the

1 other.

2 **MR. JACKLEY:** And the analysis that we used
3 is with respect to the issue of double jeopardy.

4 **THE COURT:** I understand the analysis. And I
5 understand I think -- I think you are more likely
6 right than Mr. Murphy at this stage, but I will see.
7 The truth is, I don't know. So we will have a recess
8 until I figure it out.

9 (Off the record.)

10 **THE COURT:** Initially, what has happened was
11 I was walking down the hall and the bailiff came up to
12 me and said the jury said they would continue to
13 deliberate while we were dealing with the question.

14 On another trip up or down the hall, I
15 directed the bailiff to tell the jury that we were
16 working on their question and we would hope to resolve
17 it in 20 minutes.

18 I went out to the hallway and got a soft
19 drink and the bailiff informed me that they have a
20 verdict on both counts.

21 At this stage of the game, unless there is
22 something outside the presence of the jury, I would
23 call them back into the courtroom.

24 State?

25 **MR. JACKLEY:** Yes. We're ready for the jury,

1 Your Honor.

2 **MR. MURPHY:** We have nothing.

3 **THE COURT:** Bring the jury, please.

4 (Whereupon, the following proceedings were
5 had in open court with the jury present.)

6 **THE COURT:** Okay.

7 Would the foreman please stand.

8 It's my understanding that you have reached a
9 verdict; is that correct?

10 **THE FOREPERSON:** We have, Your Honor.

11 **THE COURT:** Satisfied this is the jury,
12 Mr. Jackley?

13 **MR. JACKLEY:** I am, Your Honor.

14 **THE COURT:** Mr. Murphy?

15 **MR. MURPHY:** Yes, Your Honor.

16 **THE COURT:** Would you please hand the verdict
17 to the bailiff.

18 After I read the verdict, I will ask each of
19 you if this is your verdict as to Count One, and then
20 as to Count Two. You will each answer me in the
21 affirmative or negative. Yes or no clearly stated.

22 Any questions about that?

23 With the formal captions of the verdict form
24 omitted, the verdict reads as follows: We the jury
25 find that Mr. Graham is, Count Number One, guilty of

1 murder while in the commission of a felony.

2 Count Two, not guilty of premeditated murder.

3 Gilbert Martinez, is this your verdict as to

4 Count One?

5 **JUROR:** Yes.

6 **THE COURT:** Is this your verdict as to Count

7 Two?

8 **JUROR:** Yes.

9 **THE COURT:** Nancy Hanson, is this your
10 verdict as to Count One?

11 **JUROR:** Yes.

12 **THE COURT:** Is this your verdict as to Count

13 Two?

14 **JUROR:** Yes.

15 **THE COURT:** Mildred Fisher, is that your
16 verdict as to Count One?

17 **JUROR:** Yes.

18 **THE COURT:** Is this your verdict as to Count

19 Two?

20 **JUROR:** Yes.

21 **THE COURT:** Scott Denotter, is this your
22 verdict as to Count One?

23 **JUROR:** Yes.

24 **THE COURT:** Is this your verdict as to Count

25 Two?

1 **JUROR:** Yes.

2 **THE COURT:** Cynthia Christensen, is this your
3 verdict as -- I missed Sheila Garrigan. I will get
4 back to you.

5 Cynthia Christensen, is this your verdict as
6 to Count One.

7 **JUROR:** Yes.

8 **THE COURT:** Is this your verdict as to Count
9 Two?

10 **JUROR:** Yes.

11 **THE COURT:** And Sheila Garrigan, is this your
12 verdict as to Count One?

13 **JUROR:** Yes.

14 **THE COURT:** Is this your verdict as to Count
15 Two?

16 **JUROR:** Yes.

17 **THE COURT:** Hildur French, is this your
18 verdict as to Count One?

19 **JUROR:** Yes.

20 **THE COURT:** And your verdict as to Count Two?

21 **JUROR:** Yes.

22 **THE COURT:** Thank you.

23 Michelle Shelton, is this your verdict as to
24 Count One?

25 **JUROR:** Yes.

1 **THE COURT:** As to Count Two?

2 **JUROR:** Yes.

3 **THE COURT:** Barry Winter, is this your
4 verdict as to Count One?

5 **JUROR:** Yes.

6 **THE COURT:** As to Count Two?

7 **JUROR:** Yes.

8 **THE COURT:** James Eppard, is this your
9 verdict as to Count One?

10 **JUROR:** Yes.

11 **THE COURT:** As to Count Two?

12 **JUROR:** Yes.

13 **THE COURT:** Jo Ann Lemke, is this your
14 verdict as to Count One?

15 **JUROR:** Yes.

16 **THE COURT:** As to Count Two?

17 Is this your verdict as to Count Two which is
18 the not guilty of premeditated murder?

19 **JUROR:** Yes.

20 **THE COURT:** Thank you, ma'am.

21 James Whitman, is this your verdict as to
22 Count One?

23 **JUROR:** Yes.

24 **THE COURT:** And is this your verdict as to
25 Count Two?

1 **JUROR:** Yes.

2 **THE COURT:** Thank you.

3 Any questions further, counsel, at this time?

4 **MR. JACKLEY:** No, Your Honor.

5 **MR. MURPHY:** No, Your Honor.

6 **THE COURT:** At this point in time, ladies and
7 gentlemen, I would say this to thee, thank you. It's
8 a very difficult thing to sit in judgment in these
9 cases. You have done Yeomen's duty and we appreciate
10 it.

11 After a trial, you are excused from jury
12 duty. Obviously you came on in the last days of
13 November. Often times after a trial -- and I suspect
14 certainly after this one -- you will have people
15 inquire of you. It is your absolute privilege to say
16 yes or no.

17 I am going to ask those in the gallery to
18 allow you to leave tonight. They may inquire of you.
19 You do not have to respond. Attorneys and their staff
20 may call you. The primary purpose, at least when I
21 did it, was to see if there were -- you know, looking
22 for critique on my performance, but not anything else.
23 They may contact you, and I repeat, you are free to do
24 so.

25 Again, on behalf of Pennington County, the

1 State of South Dakota, thank you. You are excused.

2 (Whereupon, the jury was then excused from
3 their service.)

4 **THE COURT:** Please be seated.

5 Mr. Graham, you are remanded to the custody
6 of the Pennington County Sheriff.

7 And we will need to set a sentencing date. I
8 do not have my calendar. I will confer with counsel
9 and set that date.

10 It will be -- I believe, I have to by law
11 have a presentence investigation, unless it's waived
12 by everybody. In which case we can do the sentencing
13 at your convenience.

14 Other than that, I will advise counsel of the
15 time and date for sentencing. That be it.

16 We are in recess.

17 **MR. JACKLEY:** Thank you, Your Honor.

18 **THE COURT:** Anything else I need do?

19 Then we are in recess.

20 (Whereupon, the proceedings in this matter
21 were then concluded.)

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1 STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
 2 COUNTY OF PENNINGTON)
 3

4 I, TINA RAE PRUSS, Official Court Reporter
 and Notary Public in and for the County of Pennington,
 5 State of South Dakota,

6 DO HEREBY CERTIFY that the foregoing
 transcript is a true and accurate transcript of the
 7 questions asked, the testimony given, and of the
 proceedings had.

8 I FURTHER CERTIFY that I am not of kin or in
 9 any way associated with any of the parties to said
 cause of action, or their counsel; and that I am not
 10 interested in the event thereof.

11
 12 IN WITNESS WHEREOF, I have hereunto set my
 hand this 3rd day of May, 2011.

13
 14 **COPY**

15
 16 Tina Rae Pruss
 Official Court Reporter and
 Notary Public
 17 Pennington County, South Dakota
 My Commission expires: 10-04-2012
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